FILED
DEC 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-134

In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS H. HALLWARD-DRIEMEIER
Assistant to the Solicitor General

DOUGLAS N. LETTER
SHARON SWINGLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES H. THESSIN
Acting Legal Adviser

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

SUSAN R. BENDA
Attorney Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

1. Whether a suit to recover unpaid property taxes imposed on property owned by a foreign sovereign and to declare the validity of a tax lien arising out of those unpaid taxes falls within the immovable property exception to the general rule of immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(4).

2. Whether the court of appeals erred in relying on two international agreements regarding foreign sovereign immunity to which the United States is not a party in the course of interpreting the FSIA.

TABLE OF CONTENTS

Page

Statement 1
Discussion 4
A. The court of appeals' expansive construction of Section 1605(a)(4) is inconsistent with its text and the historical practice that it codified 5
B. The court of appeals' decision warrants this Court's review 17
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Alfred Dunhill of London, Inc. v. *Cuba*, 425 U.S. 682 (1976) 2, 7
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 1
Asociacion de Reclamantes v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985) 6, 8, 15, 18
City of Englewood v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985) 4, 17
City of New Rochelle v. *Republic of Ghana*, 255 N.Y.S. 2d 178 (County Ct. 1964) 9
County Bd. v. *Government of the German Democratic*, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978) 18
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 14
Fagot Rodriguez v. *Republic of Costa Rica*, 297 F.3d 1 (1st Cir. 2002) 5, 7, 15, 18

Cases—Continued: Page

MacArthur Area Citizens Ass'n v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987) 17, 18
Oyster Bay Cove Ltd. Bankr., In re, 161 B.R. 338 (E.D.N.Y. 1994) 15
PBGC. v. *LTV Corp.*, 496 U.S. 633 (1950) 13
Republic of Arg. v. *Weltover, Inc.*, 504 U.S. 607 (1992) 6, 13
Republic of Arg. v. *City of New York*, 25 N.Y.2d 252 (1969) 8, 9
The Schooner Exch. v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) 8
United States v. *City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971) 8, 9
United States v. *Yousef*, 327 F.3d 327 (2d Cir. 2003) 7
United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983) 14
Verlinden B.V. v. *Central Bank*, 461 U.S. 480 (1983) 2
Weinstein v. *Taylor*, 234 N.Y.S.2d 926 (Sup. Ct. 1962) .. 14

Treaties and statutes:

European Convention on State Immunity, 11 I.L.M. 470 (1972):
Art. 9, 11 I.L.M. at 473 ..... 4, 11, 17
Art. 29, 11 I.L.M. at 481 ..... 12, 17
United Nations Convention on Jurisdictional Immunities of States and Their Properties, 44 I.L.M. 803 (2005):
Art. 13, 44 I.L.M. at 808 ..... 4, 11, 12

Treaties and statutes—Continued: Page

Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (1972) 10
Art. 31, 23 U.S.T. at 3240 10
Consolidated Appropriation Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809:
§ 543, 118 Stat. 3011 13
§ 543(a), 118 Stat. 3011 13
§ 543(f)(4), 118 Stat. 3011-3012 13
Foreign Operations Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 543, 119 Stat. 2214:
§ 543(a), 119 Stat. 2214 13
§ 543(f)(4), 119 Stat. 2214-2215 13
Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*) 1
28 U.S.C. 1330(a) 2
28 U.S.C. 1604 1
28 U.S.C. 1605 1
28 U.S.C. 1605(a)(1) 13
28 U.S.C. 1605(a)(2) 3
28 U.S.C. 1605(a)(4) ..... *passim*
28 U.S.C . 1605(b) 16
28 U.S.C. 1609 11
28 U.S.C. 1609-1610 16
28 U.S.C. 1609-1611 3
28 U.S.C. 1610 11
28 U.S.C. 1610(a) 16
28 U.S.C. 1610(a)(4)(B) 16

Statutes—Continued: Page

28 U.S.C. 1610(d)(2) 16
28 U.S.C. 1611 11
N.Y.C. Admin. Code § 11-354 (2003) 3
N.Y. Real Prop. Tax Law § 418(1) (McKinney's 2000) 3
United Kingdom's State Immunity Act of 1978, 17 I.L.M. 1123 (1978) 12
Para. 6(1)(b), 17 I.L.M. at 1125 12
Para. 11(b), 17 I.L.M. at 1126 12

Miscellaneous:

William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239 (1920) 10
Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2d ed. 1998) 10
Council of Europe, *European Convention on State Immunity: Explanatory Report* (visited Dec. 20, 2006) <http://conventions.coe.int/treaty/en/reports/html/074.htm> 12
6 *Digest of International Law* (1968) 6
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) .. *passim*
2 Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d ed. 1945) 2, 6
Letter from Jack B. Tate, Acting Legal Adviser to Philip B. Perlman, Acting Att'y Gen. (May 19, 1962) 2, 7, 15
Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* (James M. Pedowitz ed., 1984) 16

Miscellaneous—Continued: Page

V Op. Att'y Gen. Mass. 445 (1920) 10
5 Richard R. Powell, *Powell on Real Property* (2005) ... 14
Re Power of Municipalities of Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] 2 D.L.R. 481 9
Restatement (Second) of Foreign Relations Law of the United States (1965) 6
2 Restatement (Third) of Foreign Relations Law of the United States (1987) 7
5 Restatement (First) of the Law of Property (1944) 14, 15
Sixth Report on Jurisdictional Immunities of States and Their Property, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf> *International Law Commission*, (Jan. 31, 1984) 12
Herbert Tiffany's, *The Law of Real Property* (3d ed. 1949):
Vol. 3 15
Vol. 5 15
1 *Yearbook of the International Law Commission, 1991* (Summary Records of Meetings of 43rd Sess.), Apr. 29-July 19, 1991 12

In the Supreme Court of the United States

No. 06-134

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision of the court of appeals is in error and the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

A. The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), provides "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA establishes a general rule that a foreign sovereign is immune from civil suit in the United States. 28 U.S.C. 1604. The FSIA also sets out limited exceptions to that grant of immunity. 28 U.S.C. 1605. A court may exercise jurisdiction over a foreign

state only if the suit comes within one of the FSIA's specified exceptions to immunity. 28 U.S.C. 1330(a).

"For the most part," the FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 488 (1983). That theory was announced for the United States in 1952 in the "Tate Letter." See Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter) *reproduced in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated the Department of State's policy that foreign states should thenceforth be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.*; *Verlinden*, 461 U.S. at 486-487.

Even before the Tate Letter, when the United States adhered to the so-called "absolute" theory of foreign sovereign immunity, it was established that "a foreign power which acquires" immovable property in the territory of another sovereign is "deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants." 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945); Tate Letter, *supra* ("[t]here is agreement by proponents of both [the absolute and restrictive] theories * * * that sovereign immunity should not be claimed or granted in actions with respect to real property") (*Alfred Dunhill*, 425 U.S. at 711).

The immunity exception for immovable property was carried forward in the FSIA in 28 U.S.C. 1605(a)(4). That exception provides that a foreign state shall not be immune in any case "in which * * * rights in immovable property situated in the United States are in issue." *Ibid.*

B. Respondent, the City of New York, brought suit against the Permanent Mission of India to the United Nations and the Permanent Representative of Mongolia to the United Nations for their failure to pay local property taxes imposed by respondent on

certain properties owned by the governments of India and Mongolia. The properties contain the offices of petitioners' missions to the United Nations and are used in part to house employees of the missions at a level below that of Permanent Resident or Consul General. Respondent contends that under New York law the part of the properties used for such housing is taxable. N.Y. Real Prop. Tax Law § 418(1) (McKinney's 2000).

Respondent seeks recovery of $16.4 million in unpaid taxes and interest from India, and $2.1 million from Mongolia, representing property taxes dating between 1981 and 2003. Pet. App. 4. Respondent also seeks a declaratory judgment establishing the validity of tax liens on the properties due to petitioners' failure to pay the taxes levied by respondent. *Id.* at 21 n.16.[1] Petitioners maintain that the FSIA immunizes them from respon-dent's suit and, ultimately, that the property in question is exempt from taxation pursuant to treaty. *Id.* at 22-23, 28 n.2.

C. The district court denied petitioners' motion to dismiss the claims against them as barred by foreign sovereign immunity. Pet. App. 25-45. The court held that it possessed jurisdiction over respondent's claims pursuant to the FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4). Pet. App. 21. The court did not reach respondent's alternative theory that the court possessed jurisdiction in light of the "commercial activity" exception to immunity, 28 U.S.C. 1605(a)(2). Pet. App. 21.

Petitioners appealed from the denial of immunity, and the court of appeals affirmed. Pet. App. 1-24. The court of appeals construed the immovable property exception as extending to cases involving three types of issues: "(1) the foreign country's rights to or interest in immovable property situated in the United

---

[1] Respondent's complaints initially sought to foreclose on the properties. See Am. Compl. ¶ 1 (requesting a "Judgment of Foreclosure"); N.Y.C. Admin. Code § 11-354 (2003) (authorizing city to maintain an action to foreclose a tax lien by, *inter alia*, selling property subject to tax lien "to the highest responsible bidder"). Respondent conceded in the court of appeals, however, that it would not be able to execute a judgment against the properties, see C.A. Br. 31-32, because execution would be barred by the FSIA, see 28 U.S.C. 1609-1611.

States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." *Id.* at 17-18 & n.13. The court found the text of the exception itself to be "ambiguous," *id.* at 8, and so it consulted other sources to aid its interpretation. In particular, the court of appeals relied on the fact that the European Convention on State Immunity denies immunity for "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property," *id.* at 13 (quoting European Convention on State Immunity (European Convention), 11 I.L.M. 473 (1972), Art. 9), and on a similar provision in Article 13 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties (U.N. Convention), 44 I.L.M. 808 (2005) (not yet in force), Pet. App. 14 n. 9.

The court of appeals recognized that its decision was contrary to the holding of the Third Circuit on "facts very similar to those of this case" in *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). Pet. App. 20 n.15. But the court found the Third Circuit's reasoning "unpersuasive." *Id.* at 21 n.15. The court also acknowledged that the State Department had, at the court's invitation, submitted a statement supporting petitioners' narrower construction of the immovable property exception and noting that a contrary ruling would have adverse foreign policy consequences for the United States. *Id.* at 21-22 n.17. The court concluded, however, that the State Department's views with respect to the FSIA's meaning were entitled to no special deference and that the government's policy concerns were too "vague" and insufficiently "severe" to preclude the exercise of jurisdiction. *Ibid.*

DISCUSSION

The FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4), permits a district court to exercise jurisdiction over a foreign sovereign in a case in which "rights in immovable prop-

erty situated in the United States are in issue." The court of appeals construed that exception to include not only disputes concerning "*rights in* immovable property," *ibid.* (emphasis added), but also any dispute regarding "the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. That interpretation sweeps far more broadly than either the text of the provision or the history of sovereign immunity practice supports.

This Court should grant the petition in order to review the court of appeals' erroneous holding. The court of appeals acknowledged that its construction of Section 1605(a)(4) is in conflict with that of the Third Circuit. In addition, it is in considerable tension with decisions of the District of Columbia and First Circuits. Moreover, because the court of appeals' construction of Section 1605(a)(4) diverges from accepted international norms, it is likely to have adverse consequences for the Nation's foreign policy, including retaliatory measures taken against the United States. The ruling below takes on additional significance because many countries' missions to the United Nations Headquarters are located within the Second Circuit.

A. THE COURT OF APPEALS' EXPANSIVE CONSTRUCTION OF SECTION 1605(a)(4) IS INCONSISTENT WITH ITS TEXT AND THE HISTORICAL PRACTICE THAT IT CODIFIED

1. Section 1605(a)(4) establishes a narrow exception to foreign state immunity for cases in which "rights in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). The requirement that "rights in" real property actually be "in issue" makes clear that rights of ownership, use, or possession of the property itself must be at stake for the exception to be implicated. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) ("[T]he immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue."). Contrary to respondent's contention (Br. in Opp. 15), the "taxability of the property" is not a "right in" the property in any ordinary

meaning of that term. Nor is it reasonable to construe that phrase, as the court of appeals did, to connote all "obligations arising directly out of such rights to or use of the property," including "obligations imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. Congress spoke of "rights," not "obligations," and specifically of rights "in" property, not broadly of obligations "arising directly out of" a foreign sovereign's relationship to the property. Because the court of appeals' interpretation is not supported by the statute's text, it should be rejected.

2. Even if the statutory phrase were ambiguous with regard to the question here presented, it must be understood by reference to "the pre-existing real property exception to sovereign immunity recognized by international practice" at the time the FSIA was enacted. *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985); see *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992) (FSIA's immunity exceptions should be construed in light of the understanding of "the restrictive theory at the time the statute was enacted").

Treatises on international law that pre-dated the FSIA emphasized the narrow nature of the real property exception. One commentator, for example, described the exception as permitting a foreign state to be sued to resolve "questions pertaining to title or the adverse interests of individual claimants." Hyde, *supra*, at 848. And the Restatement (Second) of Foreign Relations Law of the United States (Second Restatement) emphasized that the exception did not abrogate immunity "with respect to a claim arising out of a foreign state's ownership or possession of immovable property" that did "not contest[] such ownership or the right to possession." Second Restatement § 68 cmt. d at 207 (1965). See 6 *Digest of International Law* 638 (1968) (quoting the same); *Reclamantes*, 735 F.2d at 1522 (noting that the traditional real

property exception was "limited to disputes directly implicating property interests or rights to possession").[2]

The real property exception pre-dates not only the FSIA, but also the restrictive theory of immunity, which is itself instructive regarding the narrowness of the exception's scope. The Tate Letter noted that "[t]here is agreement by proponents of both [the absolute and restrictive] theories * * * that sovereign immunity should not be claimed or granted in actions with respect to real property." See Tate Letter *in Alfred Dunhill*, 425 U.S. at 711. Thus, contrary to the court of appeals' understanding (Pet. App. 9), the real property exception is not rooted in the restrictive theory of immunity, on the supposed premise that "ownership of real estate in a foreign country must be considered [a private act]" and therefore subjects a foreign sovereign to suit in the same way a private person would be. Rather, the real property exception traces its roots to the time of absolute immunity, and

---

[2] The Restatement (Third) of Foreign Relations Law of the United States (Third Restatement), published in 1987, is obviously a less relevant source for interpreting the FSIA of 1976 than the Second Restatement. The Third Restatement states that the immovable property exception extends as well to "controversies concerning payment of rent, taxes, and other fees concerning [embassy, consulate, or diplomatic mission] * * * property." 2 Third Restatement § 455 cmt. b. In this particular, the Restatement appears to be aspirational rather than strictly a restatement of the law. To the extent the Third Restatement suggests that a court may exercise jurisdiction over a claim seeking payment of a money obligation divorced from title, possession, or use of real property, that construction has been rejected by the First Circuit. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (2002). Moreover, so broad an interpretation of Section 1605(a)(4) would be in seeming contradiction with the Third Restatement's narrower construction of the term "rights in property" as employed in the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3). That phrase, according to the Third Restatement, "is limited to actions asserting title to property and claims to compensation for taking." Third Restatement § 455 cmt. c. The Second Circuit has directed courts to be "vigilant" when relying on the "controversial" Third Restatement. *United States* v. *Yousef*, 327 F.3d 56, 100 n. 31 (2003). That admonition is particularly appropriate when, as here, the Third Restatement seeks, without citation to authority, to broaden a rule after Congress has codified established practice.

reflects that even those who rejected the notion that a foreign sovereign should be subject to suit for its private acts recognized a real property exception because of the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521. Thus, for example, a court is not barred from adjudicating a quiet title action with respect to a local property simply because one potential claimant is a foreign sovereign. In contrast, efforts by one sovereign to collect property taxes from another sovereign is by no account the kind of "primeval interest" concerning real property itself that would have been recognized during the period of so-called "absolute" immunity from the courts' jurisdiction.[3]

The court of appeals cited two pre-FSIA decisions in support of its conclusion that courts in the United States possessed jurisdiction over claims concerning taxes levied against a foreign sovereign's real property. Pet. App. 17 n. 12 (citing *Republic of Argentina* v. *City of New York*, 25 N.Y.2d 252 (1969), and *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971)). Neither of those cases, however, involved the exercise of jurisdiction over a claim brought against a foreign sovereign or its property, and thus neither presented a question of immunity. In *Republic of*

---

[3] The court of appeals cited *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), in support of the proposition that "[w]hen owning property abroad, a foreign state must follow all the same laws that pertain to private owners of such property." Pet. App. 16-17. To the contrary, in *The Schooner Exchange* the Court expressly declined to "indicat[e] any opinion on [the] question" whether a foreign sovereign's "private property" should be treated in the same manner as that of private individuals. 11 U.S. (7 Cranch) at 145. Moreover, the court of appeals confused the question of a foreign state's obligation to obey local law with the availability of local judicial jurisdiction to compel compliance. With respect to the latter, the Court made clear that no jurisdiction could be presumed over a foreign sovereign's "public" property, such as an armed ship, "employed by him in national objects." *Ibid.* Thus, *The Schooner Exchange* does not support the exercise of jurisdiction over the property of a foreign state used for public purposes, such as the housing of a diplomatic mission and its staff.

Argentina, the foreign state affirmatively invoked the jurisdiction of the court to seek the return of municipal taxes that had already been paid and a declaration that no further taxes were owed. 25 N.Y. 2d at 257. Argentina thus waived any immunity from the court's exercise of jurisdiction to render a declaration regarding the taxes' validity (which the court did, in favor of Argentina). In *Glen Cove*, no foreign state was even a party to the litigation. Rather, the United States sued (successfully) to enjoin the assessment of taxes against a diplomatic residence of the Soviet Union and to have tax liens against the property discharged. 322 F. Supp. at 150, 155.

Respondent acknowledges that, "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute." Br. in Opp. 15. Respondent maintains, however, that that fact "is of no significance, because it is also true that no court during that period declined to exercise such jurisdiction." *Id.* at 15-16. That is not so. For example, in *City of New Rochelle* v. *Republic of Ghana*, 255 N.Y.S. 2d 178 (County Ct. 1964), the court dismissed, on the basis of the State Department's suggestion of immunity, the municipality's suit to foreclose on tax liens on real property owned by several foreign countries for the purpose of housing their principal representatives to the United Nations. *Id.* at 179. See also *Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] 2 D.L.R. 481, 500 (recognizing that "Courts * * * are without jurisdiction" to determine a tax against a foreign sovereign's land).

In any event, contrary to respondent's suggestion, the dearth of pre-FSIA cases addressing foreign states' immunity from suit regarding tax liabilities on real property is not neutral as to the parties' respective positions. Rather, it reflects the widespread understanding that foreign sovereigns and their property enjoyed immunity from such suits. It has always been the general rule in the United States that foreign sovereigns are immune from the courts' jurisdiction, subject to specific exemptions. Respondent's inability to cite pre-FSIA examples of courts exercising jurisdic-

tion over property tax claims is strong evidence that no exception to the general rule of immunity existed as to such claims. In fact, one reason given by those commentators who argued that foreign sovereigns should be exempt from property taxes in the first place was "the impossibility of collecting any taxes, since foreign states and their property are not subject to suit or judicial process." William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 256 (1952)). See *id.* at 242 (quoting V Op. Att'y Gen. Mass. 445 (1920) ("[E]ven in the event that a tax [on personal property] were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax.").

3. International agreements also support the conclusion that the immovable property exception does not abrogate immunity for the broad range of claims indicated by the court of appeals. The Vienna Convention on Diplomatic Relations (Vienna Convention), to which the United States is a party, 23 U.S.T. 3227 (1972), contains, in Article 31, an analogous exception to the immunity of diplomatic agents for "*a real action* relating to private immovable property situated in the territory of the receiving State, unless [the agent] holds it on behalf of the sending State for the purposes of the mission." *Id.* at 3240 (emphasis added). The term "a real action" excludes "actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998). Notably, the House Report on the FSIA specifically refers to the Vienna Convention in its discussion of the immovable property exception to immunity in Section 1605(a)(4) and

reflects Congress's understanding that the FSIA was consistent with it. See H.R. Rep. 1487, at 20.[4]

The court of appeals looked to and misinterpreted the European Convention and the U.N. Convention as supporting a broader construction of the FSIA's immovable property exception that encompasses suits regarding "obligations arising directly out of [a foreign state's] rights to or use of [immovable] property." Pet. App. 18. See *id.* at 13-16. Article 9 of the European Convention abrogates immunity for suits involving not only a foreign state's "rights or interests in, or its use or possession of, immovable property," but also its "obligations arising out of its rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473; see Pet. App. 13. And Article 13 of the U.N. Convention similarly provides an exception to immunity in cases involving not only "any right or interest of the State in, or possession of," immovable property, but also "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808; see Pet. App. 14 n.9. The court of appeals found it inconsequential that Congress did not enact in the FSIA language such as that used in the latter portion of the exception in those conventions. *Id.* at 14. The court viewed the language of Section 1605(a)(4) as sufficiently "broad" that it did not "preclude[] its interpretation as synonymous to the European Convention." *Ibid.* As petitioner points out (Pet. 12), however, Section 1605(a)(4) creates an exception to a foreign state's immunity only for cases in which "rights in" immovable property are themselves "in issue," not cases involving "obligations arising out of" the foreign state's rights or interests in or possession of such property.

Moreover, even the European and U.N. Conventions in fact do not abrogate immunity in a case such as this. The court of

---

[4] The FSIA, of course, contains separate provisions regarding attachment and execution that would govern actual relief, such as an order of sale or possession of a foreign state's property. See 28 U.S.C. 1609, 1610, 1611; see note 1, *supra*.

appeals overlooked the fact that Article 29 of the European Convention explicitly excludes proceedings concerning "customs duties, taxes or penalties" from its coverage. 11 I.L.M. at 481. Such claims involving public law disputes between states are outside the scope of the Convention, which "is essentially concerned with 'private law' disputes between individuals and States." Council of Europe, *European Convention on State Immunity: Explanatory Report* ¶ 113 (visited Dec. 20, 2006) <http://conventions.coe.int/treaty/en/Reports/HTML/074.htm>. The drafting history of the U.N. Convention similarly makes clear that Article 13 was not understood to permit suits to recover taxes or to impose tax liens on foreign state-owned property. In the early stages of drafting, the International Law Commission included both an immovable property exception (mirroring that ultimately adopted as Article 13) and also a separate provision waiving immunity for suits to collect taxes on real property used for commercial purposes. See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, at 21-25, Art. 17, U.N. Doc. A/CH.4/376 (1984) (Art. 17), *at* <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf>. The tax exception was subsequently deleted, with the explanation that it implicated state-to-state relations rather than the types of dispute between states and private persons that the Convention was intended to address. See *Yearbook of the International Law Commission 1991*, Vol. 1 (Summary Records of Meetings of 43rd Sess., Apr. 29-Jul. 19, 1991), at 84 (¶ 6). The clear implication is therefore that the drafters of the U.N. Convention did not understand property tax claims to fall within that Convention's immovable property exception.[5]

---

[5] The United Kingdom's State Immunity Act 1978, 17 I.L.M. 1123 (1978), has a real property exception nearly verbatim to the European Convention's. *Id.* at 1125 (¶ 6(1)(b)). Significantly, it has a *separate* exception for tax claims that, with respect to real property, is limited to premises occupied by the foreign sovereign "for commercial purposes." *Id.* at 1126 (¶ 11(b)). Of course, both the separate exception and its limitation to commercial property would be

Thus, contrary to the court of appeals' belief that it was construing the FSIA's language "as synonymous to the European Convention's version," Pet. App. 14, and furthering "conformity" in practice among nations, *id.* at 12, the court has in fact introduced a significant and unwarranted inconsistency in international practice. The conventions reflect the understanding of their drafters that, even in the era of the restrictive theory, the longstanding exception to immunity for suits involving rights in immovable property does not subject a foreign sovereign to suit on a state-to-state dispute over whether property is subject to taxation.[6]

4. As an alternative basis to defend the court of appeals' judgment, respondent contends that its asserted tax lien is a "right in immovable property," which serves as a basis for the court's juris-

---

superfluous if the real property exception had the breadth attributed to it by the court below.

[6] The court of appeals also erred in relying on appropriations legislation enacted by Congress in 2004 and 2005 in construing the FSIA's immovable property exception. See Pet. App. 11-12. Those enactments provide for the deduction from foreign aid to a country of an amount "equal to 110 percent of the * * * unpaid property taxes owed by the central government of such country" to New York City or the District of Columbia, as determined "in a court order or judgment entered against such country by a court of the United States." Pub. L. No. 109-102, § 543(a) and (f)(4), 119 Stat. 2214-2215; Pub. L. No. 108-447, § 543(a) and (f)(4), 118 Stat. 3011-3012.

Legislative action nearly 30 years after enactment of the FSIA provides "a hazardous basis for inferring the intent" of the earlier Congress. *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). The fact that Congress has provided a mechanism for fulfilling judgments in the event they are rendered says nothing about whether Section 1605(a)(4), enacted 30 years earlier, is an appropriate basis for exercising jurisdiction over such claims. Moreover, contrary to the court of appeals' understanding, petitioners' construction of the immovable property exception would not "make dead letters" of the more recent enactments. Pet. App. 12. Neither provision refers to the immovable property exception, and each could be given full effect as to judgments rendered pursuant to Section 1605(a)(1) (waiver of immunity) or in a suit brought *by* a foreign state, *e.g.*, *Republic of Argentina* v. *City of New York*, 25 N.Y.2d 252 (1969).

diction. Br. in Opp. 15. As respondent acknowledges (*id.* at 5), however, the court of appeals specifically disavowed any reliance on "[t]he fact that [petitioners'] alleged obligations have converted into tax liens." Pet. App. 21 n.16. Respondent's alternative theory suffers from at least two defects. First, a lien to secure a debt is not a "right in immovable property" to which Section 1605(a)(4) applies. Second, allowing respondent's purported lien to serve as the basis for exercising jurisdiction would violate the FSIA's prohibitions against pre-judgment attachments and in rem jurisdiction.

a. Section 1605(a)(4) abrogates immunity only with respect to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). A tax lien is not a "right in" real property, but merely provides security for payment of a money debt. See *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (liens are "merely a means to the end of satisfying a claim for the recovery of money," providing a compensatory remedy rather than specific relief); *Weinstein* v. *Taylor*, 234 N.Y.S.2d 926, 926 (Sup. Ct. 1962) (tax lien is not an "estate or interest in real property"); 5 Richard R. Powell, *Powell on Real Property* § 38.02[2], at 38-7 (2005) (a judgment lien "is not an estate in the debtor's land"); 5 Restatement (First) of the Law of Property § 540 cmt. a, at 3238 (1944) (First Restatement) ("the lien constitutes merely additional security for the performance of the promise").[7]

In support of its broader construction of the exception, respondent cites (Br. in Opp. 15 n.16), as did the court of appeals (Pet. App. 10-11), a reference in the legislative history of Section 1605(a)(4) to "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. 1487, at 20. It is far from clear that the House Report reference signifies an intent (let alone would pro-

[7] That is not to say that a lien is not itself "property," but only that it is not among the "rights in immovable property" specified in 28 U.S.C. 1605(a)(4). Cf. *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (noting that debtor's property subject to tax lien was part of debtor's estate, and that holder of tax lien could not resort to the "remedy of possession").

vide a sufficient basis) to expand the preexisting real property exception to include, for example, a new category encompassing all rent claims. See *Fagot Rodriguez*, 297 F.3d at 11 (rejecting non-possessory claim for back rent); *Reclamantes*, 735 F.2d at 1522 n.5.[8]

In any event, the quoted language in the legislative history does not encompass an action to establish the validity of a lien. The common law did not even recognize a lien on land. 5 Herbert Thorndike Tiffany, *The Law of Real Property* § 1559, at 650 (3d ed. 1939). It also distinguished clearly between a lien and a servitude (or "servient tenement"), the latter constituting a direct interference with the ownership, possession, or use of one's land. See 3 Tiffany, *supra*, §§ 756, 758, at 200-201, 203-204; see also 5 First Restatement § 450 & cmt. a, § 455, at 2901-2903, 2919. A lien is different from rights in land such as covenants, easements and servitudes in important respects. For example, an order to sell property in bankruptcy free and clear of all liens, claims encumbrances and rights "does not indicate that the property is to be sold free and clear of non-monetary restrictions of record which run with the land," such as servitudes. *In re Oyster Bay Cove, Ltd. Bankr.*, 161 B.R. 338, 343 (E.D.N.Y. 1994). A lien holder's primary claim is to the payment of debt, whereas a person suing for title, possession, or enforcement of a servitude seeks an immediate interest in the property itself. Especially in light of the historical origins of the immovable property exception, a lien is not a "similar matter" to issues of ownership, servitudes on the

---

[8] The cited language appears in the Report's response to a hypothetical objection that the scope of Section 1605(a)(4) was inconsistent with the Tate Letter's statement that "diplomatic and perhaps consular property" was "excepted" from the real property rule. The Report states that the Tate Letter referred only to "attachment" or "execution" of diplomatic property, and then observes that the Vienna Convention would permit adjudication of "questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." H.R. Rep. 1487, at 20. The report does not specify whether its reference to "rent" refers to the Vienna Convention's real property exception or to its commercial activity exception.

land, and even rents. It is one thing to ensure that foreign sovereign immunity does not prevent adjudication of title and covenants in real property—matters at the heart of the sovereign's primeval interest in real property within the realm—and quite another to expand the exception to cover debt collection efforts that attempt to use the property as a security.[9]

b. The second defect in respondent's tax lien theory was identified by the court of appeals, see Pet. App. 21 n.16, namely that it is contrary to the FSIA's prohibition against using pre-judgment attachment to establish jurisdiction. See 28 U.S.C. 1609-1610; 28 U.S.C. 1610(d)(2) (permitting pre-judgment attachment only by waiver or "to secure satisfaction of a judgment * * * and not to obtain jurisdiction"); H.R. Rep. 1487, at 26-27 (FSIA was intended to end the practice of permitting "an attachment for the purpose of obtaining jurisdiction over a foreign state or its property").[10] Indeed, the FSIA significantly limits the measures of restraint against sovereign property that a court can impose even in the event of a judgment. See 28 U.S.C. 1610(a)(4)(B); 28 U.S.C. 1610(a). Given such restrictions on the court's ability to impose measures in aid of execution, it is inconceivable that respondent could, through the mere statutory declaration of a lien or other self-help measures, create jurisdiction in the court.

---

[9] Notably, New York law creates a host of other liens related to real property, including an emergency repair lien; relocation lien; pest control lien; housing violations and civil penalty lien; canopy lien; leaking tap lien; building inspection fees lien; sidewalk repair lien; and environmental control board lien. See Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* 311-314 (James M. Pedowitz ed., 1984). It is all but inconceivable that Congress intended to abrogate immunity with respect to so broad an array of municipal claims by its reference to "rights in immovable property" in Section 1605(a)(4).

[10] Indeed, the only FSIA provision pertaining to liens, the exception from jurisdictional immunity for a suit in admiralty brought to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state, and does not allow arrest of the vessel. See 28 U.S.C. 1605(b); H.R. Rep. 1487, at 21-22.

B. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

1. The court of appeals' decision creates an acknowledged circuit conflict with respect to the meaning of Section 1605(a)(4). The Second Circuit recognized (Pet. App. 20 n.15) that its decision is contrary to the Third Circuit's in *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). And although the court of appeals did not acknowledge the point, its interpretation of Section 1605(a)(4) is also contrary to that of the District of Columbia and First Circuits.

In *Englewood*, the Third Circuit held that a suit to establish the amount of real property taxes owed by the Government of Libya and the validity of a tax lien against the property did not fall within the scope of Section 1605(a)(4). 773 F.2d at 36. The court construed the exception as limited to claims concerning "title" or the "right to exclude others from possession." *Ibid.*[11]

The District of Columbia and First Circuits have similarly recognized that the FSIA's immovable property exception "was not intended broadly to abrogate immunity for any action touching upon real estate," *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), but is limited to "cases in which rights of ownership, use, or possession are at issue,"

---

[11] The United States filed an amicus brief in support of a petition for rehearing in *Englewood*, asserting that suits to recover unpaid taxes on foreign states' real property are cognizable under Section 1605(a)(4). The government relied heavily on the perceived anomaly of allowing a foreign state to shield itself from judicial enforcement of property taxes if it is nevertheless obligated to pay the tax. The United States' brief did not discuss the significance of pre-FSIA practice, nor did it recognize the inconsistency between the lien-theory of jurisdiction and the FSIA's anti-attachment provisions. It also made the same error as the court of appeals when it cited the broad language of the immovable property exception in the European Convention (Art. 9) but overlooked the specific exclusion for proceedings related to taxes on immovable property (Art. 29). Upon further consideration, the United States concluded, and advised the court below, that the position stated in its *Englewood* brief was in error.

Fagot Rodriguez, 297 F.3d at 13. See, *e.g.*, *Reclamantes*, 735 F.2d at 1520-1522 & n.5 (noting that Section 1605(a)(4) is focused on disputes over title and possession). Those courts have rejected a claim for "purely compensatory rights," such as unpaid rent, *Fagot Rodriguez*, 297 F.3d at 11, and nuisance, *MacArthur Area Citizens*, 809 F.2d at 921, even if those claims arise, in the words of the court of appeals in this case, "out of * * * use of the property." Pet. App. 18.[12] The court of appeals attempted to distinguish *Fagot Rodriguez* and *MacArthur Area Citizens* on their facts on the theory that, unlike in this case, no ongoing property dispute existed at the time the court of appeals ruled. See *id.* at 19 n.14. That distinction is not persuasive. In each case, the court made clear that jurisdiction would have been appropriate only if the plaintiff had made some claim *to the property itself*. See *Fagot Rodriguez*, 297 F.3d at 13 (rental disputes "unaccompanied by issues of ownership, possession, or use" are not within the real property exception); *MacArthur Area Citizens*, 809 F.2d at 921 (emphasizing that the plaintiff "makes no claim to any interest in that property"). Thus, the supposed distinction urged by the court below is merely a feature of happenstance, not a distinction of jurisdictional significance.

Moreover, the issue on which the courts of appeals are divided is important to our Nation's foreign relations. The Second Circuit is the home of the United Nations Headquarters and most missions to that international body. As the Department of State explained in its submission to the court of appeals, the exercise by

---

[12] In *Reclamantes*, the District of Columbia Circuit expressed the view in dictum that an interpretation of Section 1605(a)(4) as limited to disputes directly implicating property interests or rights to possession was consistent with an unpublished district court decision holding that Section 1605(a)(4) allowed a suit for a declaratory judgment that a foreign state's property was subject to a tax lien. See 735 F.2d at 1522 (discussing *County Board* v. *Government of the German Democratic Republic*, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978)). The court of appeals held, however, that claims arising out of the alleged taking and conversion of certain land grants did not fall within the exception. *Id.* at 1522-1524.

courts in the United States of jurisdiction over claims for unpaid property taxes and for tax liens on foreign state property is likely to give rise to complaints "that the United States is failing to live up to its obligation to protect [the U.N. diplomatic community] against infringements of sovereign immunity" and may provoke referral of the matter to the International Court of Justice by the United Nations. Gov't C.A. Br. 9-10.[13] There is also a danger that foreign governments will retaliate, by placing liens on United States-owned real property abroad, or otherwise hindering the ability of the United States' missions abroad to buy, sell and construct diplomatic properties. One foreign state defendant has already responded to the assertion of jurisdiction over it by blocking the United States Government's sale of a major piece of property in that country.

Because of the circuit conflict and the importance of the immunity issue, review by this Court is warranted. There is no need, however, for the Court to grant independent review on the second question presented in the petition (Pet. i)—whether the court of appeals erred in considering the European Convention and the United Nations Convention in the course of determining the scope of foreign sovereign immunity conferred by the FSIA. The question whether and to what extent those international agreements shed light on the proper construction of the FSIA's immovable property exception is subsumed within the first question presented.

---

[13] Notably, since the court of appeals' decision was issued in this case, additional suits to enforce tax liens have been filed against foreign states. See *City of New Rochelle* v. *Republic of Liberia*, No. 06 Civ. 5969 (S.D.N.Y.); *City of New Rochelle* v. *Republique Federale du Cameroun*, No. 06 Civ. 5970 (S.D.N.Y.). See also Pet. App. 4 n.2. (noting similar lawsuits brought by respondent against the Governments of Turkey and the Philippines).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS H. HALLWARD-DRIEMEIER
Assistant to the Solicitor General

DOUGLAS N. LETTER
SHARON SWINGLE
Attorneys

JAMES H. THESSIN
Acting Legal Adviser

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

SUSAN R. BENDA
Attorney Adviser
Department of State

DECEMBER 2006